Mainline Contracting Corp. *and* International Union of Operating Engineers, Local No. 17. Case 3–CA–21198

August 2, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On December 29, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as further explained below, and to adopt the recommended Order as modified and set forth in full below.

The Respondent is engaged in the construction industry as a demolition contractor. At all times material to this proceeding, its employees were not represented by any labor organization. On December 2, 1997, approximately 20 members of the International Union of Operating Engineers, Local No. 17 (the Union) arrived at the Respondent's headquarters. They each completed and submitted copies of the Respondent's 10-page job application. Each union member applicant wrote "voluntary union organizer" across the top of the application's front page, and included additional union forms, including a resume, cover letter, and union job application.

The Respondent had no formal application and hiring procedures in December 1997. Sometime after receiving the batch of union member applications, however, the Respondent instituted new hiring procedures, including the following prohibition:

> **Applicants are forbidden from marking their application blanks to show race, color, religion, creed, sex, national origin, age, legal out-of- work activity, bankruptcy, or protected concerted under the National Labor Relations Act.** Applications delivered to Mainline with any such information on them will not be considered for any purpose. [Emphasis in original.]

The Respondent posted on its door and in its lobby area a notice describing the new application procedures, and it distributed copies of the notice to managers who had hiring authority. The Respondent also began using a new application form that reiterated the above prohibition and stated that applications would be valid for only 30 days. A March 6, 1998 letter from the Respondent informed each of the December 2 union member applicants of the new application procedures. The letter also stated that the Respondent was not presently hiring and that their applications would be placed in an inactive file because they were more than 30 days old.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by adopting and maintaining new application procedures in order to exclude from consideration for hire the December 2 applicants and in order to avoid more union affiliated applicants. In accord with *H. B. Zachry Co.*,[2] he found further that the Respondent's new prohibition against revealing protected concerted activity was inherently destructive of important employee rights. Accordingly, he concluded that the policy would violate Section 8(a)(1) even if the Respondent had implemented it for valid business reasons and without a specific intent to discriminate.

The Respondent excepts to the judge's decision and argues that it conflicts with the decisions of the courts of appeals in *Boilermakers v. NLRB*, supra, and *TIC-The Industrial Co. Southeast v. NLRB*, 126 F.3d 334 (D.C. Cir. 1997). For the reasons fully stated in the judge's decision, we agree that the Respondent violated Section 8(a)(3) and (1) by discriminatorily changing its hiring procedures. Contrary to our dissenting colleague, we further agree with the judge that, even if there were no specific evidence of antiunion motivation, the Respondent's newly instituted policy of excluding from consideration for hire all applicants who reveal their union affiliation is inherently destructive of employee rights within the meaning of well-established precedent.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 319 NLRB 967, 968 (1995), enf. denied, sub nom. *Boilermakers v. NLRB*, 127 F.3d 1300 (11th Cir. 1997).

[3] *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967); *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 228 (1963); *H. B. Zachry*, supra.

In *Boilermakers*, supra, the Eleventh Circuit expressly rejected the Board's holding in *H. B. Zachry* that an employer's policy of excluding from consideration for hire applicants who write "voluntary union organizer" or other words to that effect on their application is inherently destructive. Although, as stated below, we find this case to be distinguishable from *Boilermakers*, we respectfully disagree with the Eleventh Circuit and adhere to Board precedent on the "inherently destructive" issue.

In *TIC-The Industrial Co. Southeast*, the D.C. Circuit did not address the issue of whether the employer's application policy was inherently destructive of employee rights. The court disagreed with the Board that the respondent disparately enforced its ban on extraneous information.

The Respondent's policy unambiguously penalizes and deters protected concerted activity. The protected employee rights enumerated in Section 7 of the Act specifically include the "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." The Supreme Court has stated that:

> There is no indication that Congress intended to limit this protection [of Section 7] to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of [Section] 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.[4]

It is obvious that the 20 union affiliated applicants in this case were acting in actual concert and communication with one another when they concomitantly declared their organizational objective on their applications to the Respondent. In this respect, "[t]he placement of 'volunteer union organizer' on applications is an act of self-identification, analogous to the display of union insignia, and represents the type of solidarity that Section 7 was designed to protect." *H. B. Zachry*, 319 NLRB at 980.

Citing the decision of the Eleventh Circuit in *Boilermakers*, supra, our dissenting colleague rejects the union-insignia analogy, on the ground that only communication with the employer (and not with fellow employees) is involved in the display of union affiliation here. On this view, there is no connection between the display and a purpose protected by the Act. We respectfully disagree. The view expressed by the Eleventh Circuit and our colleague is simply too narrow, in light of the Act's policies.

Declaring one's union affiliation to the employer, even as an applicant for work, is the first step toward seeking union recognition and engaging in collective bargaining. Accord: *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941) ("[d]iscrimination against union labor in the hiring of men is a dam to self-organization at the source of supply"). The declaration puts the employer on notice that self-organization among his employees is likely to begin (assuming, of course, that the applicants are qualified and are hired). At the same time, it shows the employer that union adherents may be a significant part of the qualified labor pool, a fact that may persuade the employer not to oppose organizing activity. Where, as in this case, declarations are made in coordinated fashion by a group of applicants, the activity is clearly concerted *and* protected under the Act. Agreeing to make the declaration, and then acting on that agreement, builds "mutual aid and protection." It ensures that all applicants share the risk of discrimination and that all, in effect, mutually pledge to engage in organizing if they are hired.[5]

Even if these applicants had been unaware of each other's actions, however, we find that an individual employee applicant's declaration to a prospective employer of the intent to organize its employees is an "integral aspect" of the "collective process," as described by the *City Disposal* Court. As such, it is protected by Section 7 and Section 8(a)(3) against employment discrimination. There are no logical limits to the contrary view of the dissent and Eleventh Circuit that there is no "right for [u]nion applicants to let employers know about their union affiliation in direct contravention of the employer's neutral nondiscriminatory policy prohibiting extraneous information of any kind." *Boilermakers*, 127 F.3d at 1310. If an employer may prohibit the proffer of such information at the hiring threshold, then presumably it could impose the same "don't tell" rule on employees actually on the job, frustrating their ability to deal with their employer as a group. Surely such a rule would violate the Act. Yet applicants, too, are employees under the Act and their declaration of union support serves the same purposes, albeit at the preliminary stage of the employment relationship.

Furthermore, for the reasons previously stated by the judge in *H. B. Zachry*, id. at 981–982, we give little weight to the asserted legitimate interest of the Respondent for implementing a hiring rule prohibiting an applicant's disclosure of union affiliation. The Respondent contends that it adopted the new rule in order to conform to Federal antidiscrimination laws and to avoid discrimi-

[4] *NLRB v. City Disposal Systems,* 465 U.S. 822, 835 (1984).

[5] As this case illustrates, job applicants may well be participants in the "collective process" of organizing. We accordingly disagree with the contention of our dissenting colleague that the "concerted activity" analysis underlying *City Disposal* is applicable only where an actual employment relationship exists. It is well established that job applicants are protected "employees" for purposes of the Act. E.g., *Phelps Dodge*, supra. We see no basis for narrowing the definition of protected concerted activity in the context of job applications. Cf. *Mason-Rust*, 179 NLRB 434, 439–440 (1969), enf. denied on other grounds 449 F.2d 425 (8th Cir. 1971), cert. denied 405 U.S. 1066 (1972) (finding an 8(a)(1) violation based on refusal to hire black applicants who sought modification of employer's allegedly discriminatory hiring practices).

nating in its hiring practices. That justification would support elimination of any employer inquiries about an applicant's union affiliation, but it does not extend to prohibition of an applicant's volunteering such information. Such disclosure does not itself cause an employer to discriminate in its employment practices. An employer cognizant of an employee's union sentiments is perfectly capable of making hiring decisions, directing an employee's work, and imposing discipline in accord with the law and without regard for those sentiments, whether they are for or against unionization.

The obvious real purpose of the Respondent's ban relates to the prospect of litigation. The Respondent aims to fetter the ability of applicants and employees to bring claims of employment discrimination. While this might have the salutary effect of deterring frivolous claims, it would also (not coincidentally, we think) make it more difficult to prove employer knowledge of union activity even in instances where the employer actually has acted with union animus. The Act is designed to protect employees from discrimination, not to protect employers from discrimination claims. We therefore perceive no basis for limiting the scope of Section 7 in deference to the Respondent's interests.

Although we adhere to *H. B. Zachry,* supra, on this issue, we find as well that the court cases relied on by the Respondent are distinguishable from the present case. In particular, the inherent discriminatory effect of the new policy at issue in the present case is more overt and specific than the policies at issue in either *Boilermakers* or *TIC*. Those cases involved a general "no extraneous information" policy that disqualified, among others, persons who identified their voluntary union organizer status on their application forms. In contrast, the Respondent's policy does not on its face generally prohibit all extraneous information on its application form. The policy disqualifies from hiring consideration *only* those applicants who provide information on their application about status or activity protected by the Act or by other Federal statutes. Consequently, a policy purportedly implemented to avoid discrimination against protected classes or activity has the exact opposite effect. Regardless of relative skills, experience, and training, an applicant who writes "voluntary union organizer" on the applicant form is excluded from hiring consideration, while an applicant who makes some other extraneous mark (such as "I am on a bowling team with many of your employees") remains eligible. Further, an applicant who has arguably relevant, union affiliated training, experience, and references might be chilled from revealing this information on the application, thus placing the applicant at a competitive disadvantage. We think this is far more likely to occur where an employer's policy specifically forbids disclosure of protected concerted activity under the Act, than where the employer's policy forbids only "extraneous" information. Our dissenting colleague's interpretive gloss on the application provision ignores the likelihood that applicants will interpret the provision more broadly than he does.[6] We therefore affirm the judge's finding that such a policy is inherently destructive of Section 7 rights and violates 8(a)(1).

AMENDED REMEDY

We find that the remedy outlined in *FES*, 331 NLRB 9 (2000), for an unlawful refusal to consider for hire is appropriate here, in light of the violations found. Accordingly, we will modify the judge's recommended Order and notice to comport with *FES*.[7]

If it is shown at a compliance stage of this proceeding that the Respondent, but for the failure to consider the discriminatees on December 2, 1997, would have selected any of them for any job openings arising after the beginning of the hearing on October 20, 1998, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such position and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Mainline Contracting Corp., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adopting and maintaining a policy of excluding from consideration for hire job applicants who disclose protected concerted activity on application forms.

---

[6] Particularly in this respect, there is a clear distinction between prohibiting an applicant from disclosing an identifying characteristic such as race or gender and prohibiting the disclosure of union affiliation (including, presumably, employment-related activity that would necessarily disclose this affiliation). Thus, we disagree with our dissenting colleague that union activity was "simply another irrelevant factor" that the Respondent wished to exclude from the hiring process. To the extent that the Respondent's efforts to shield itself from lawsuits were legitimate, in any case, they must give way the Sec. 7 rights implicated here.

[7] We shall also modify the judge's recommended Order in accord with *Indian Hills Care Center*, 321 NLRB 144 (1996).

(b) Discriminatorily adopting and maintaining new hiring procedures in order to exclude from consideration for hire union affiliated applicants and in order to avoid more union affiliated applicants.

(c) Failing and refusing to consider applicants for employment on the basis of their union affiliation.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the new hiring policies set forth on its new application form and in its March 6, 1998 letter to applicants.

(b) Consider for hire Francine A. Dole, Steven A. Everett, James J. Erhardt, Richard Ferraro, Edward M. Fischer, Mark W. Flowers, Paul R. Heim, Linda R. Hummel, Angela Lambert, Carl A. Larson, Tracy Myles, Ellen E. Preischel, David D. Ricotta, Robert C. Slocum, Stephen S. Smith, Gary R. Swain, Antonio Ventresca, Kenneth J. West, James W. Yeates, Joe R. Bilger, Robert Grankowski, Danny L. Hayes, Paul Franklyn Pittorf, and Kathleen Kirk St. John for future job openings for a period of 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Charging Party, International Union of Operating Engineers, Local No. 17, and the Regional Director for Region 3 of future openings in positions for which the discriminatees applied or substantially equivalent positions for a period of 6 months from the date of this Order. If it is shown at a compliance stage of this proceeding that the Respondent, but for the failure to consider the discriminatees on December 2, 1997, would have selected any of them for any job openings arising after the beginning of the hearing on October 20, 1998, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such position and make them whole for any losses, in the manner set forth in the amended remedy section of this Decision and Order.

(c) Within 14 days from the date of this Order, notify the discriminatees in writing that any future job applications will be considered in a nondiscriminatory way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider the discriminatees for employment, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

(e) Within 14 days after service by the Region, post at its place of business in Buffalo, New York, and all current jobsites, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to each of the discriminatees named above. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I agree with the administrative law judge and my colleagues that the Respondent violated Section 8(a)(3) and (1) by unlawfully modifying its hiring procedures for the purpose of excluding the discriminatees and other union applicants from consideration for employment and for hire. I further agree that, to remedy this violation, the Respondent is required to rescind these unlawfully motivated procedures. This includes the requirement that the Respondent rescind, from its applications, the provision stating that:

> Mainline Contracting Corp. is an equal opportunity employer. If you provide any information not requested on this application form such as race, religion, color, creed, sex, national origin, age, or protected concerted activity under the National Labor Relations Act, your application will be rejected and not considered for any purpose.

However, contrary to the judge and the majority, I do not agree that, even were the above-application provision not discriminatorily motivated, the Respondent nonetheless violated Section 8(a)(1) when implementing it, on the theory that this provision was inherently destructive

[8] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of employees' Section 7 rights. Instead, consistent with the analysis in *Boilermakers v. NLRB*, 127 F.3d 1300 (11th Cir. 1997), I find that this provision is facially neutral and does not interfere with any statutorily protected employee rights. See also *TIC-The Industrial Co. Southeast v. NLRB*, 126 F.3d 334 (D.C. Cir. 1997) (no violation where employer refused to consider applicants not complying with its neutral application procedures).

In *Boilermakers*, the court, among other things, denied enforcement of that portion of the Board's decision in *H.B. Zachry Co.,* 319 NLRB 967 (1995), which held that Zachry violated Section 8(a)(1) by refusing to consider employment applications which contained extraneous information. Contrary to the Board, the court found lawful a provision on Zachry's employment application that specified that applicants were to "PROVIDE ONLY THE INFORMATION REQUESTED. FAILURE TO DO SO WILL RESULT IN DISQUALIFICATION OF YOUR APPLICATION." The court further found that Zachry lawfully applied this provision so as to exclude from consideration those applications on which individuals had written "voluntary union organizer."

In *Boilermakers*, the court expressly rejected the argument, advanced here by the judge and my colleagues, that the application provision inherently destroyed employee Section 7 rights. Instead, the court found that the act of writing "volunteer union organizer" was *not* analogous to the recognized right of employees to display union insignia. Cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). The Court held that while the right to wear union insignia is predicated on the principle that an employee has the right to communicate with other employees regarding the employee's views on self-organization at the jobsite, the union members applying at Zachry "did not attempt to communicate their union affiliation to other employees; they attempted to communicate that affiliation only to [Zachry]." Hence, the court found that the interests of self-organization and solidarity were not implicated. "Any display of union affiliation in a job application, which is seen only by the employer, is not linked to a purpose protected by the Act." 127 F.3d at 1310.[1]

In *Boilermakers*, the court concluded that it knew of no right of employees to inform potential employers about their union affiliation in derogation of the respondent's neutral nondiscriminatory policy.[2] Accordingly, the court found that the challenged application provision did not violate Section 8(a)(1). I find the court's rationale and holding directly applicable to the instant case.

I reject my colleagues' attempt to claim, as protected, precisely that conduct which the Eleventh Circuit correctly concluded was merely an attempt to communicate union affiliation to the Respondent. Contrary to the majority, writing "voluntary union organizer" on the application did not constitute the first step toward union recognition because, as found by the court, this conduct neither implicated the interests of solidarity nor self-organization, nor did it constitute a purpose protected under the Act. 127 F.3d at 1310.

Further, in this regard, my colleagues misconceive the issue. The issue is not whether employees have a Section 7 right to declare to their employer their allegiance to the Union. Even if they have that right, and cannot be punished therefor, that is not the issue here. The issue here is whether the Employer must permit employees to express their allegiance on an employer document, where, as here, the Employer has a legitimate interest in "keeping clean" that document.

My colleagues contend that the policy in *Boilermakers* is distinguishable because it forbade all extraneous information, whereas the policy here forbids only information concerning a status or activity protected by Federal statutes. The asserted difference is that a comment such as "I am on a bowling team" would be forbidden under the policy in *Boilermakers*, and permitted under the policy here.

I disagree with this contention. Even if the prohibition here is narrower than that in *Boilermakers*, the distinction is without legal significance. In both cases, the employer is seeking to remain ignorant of protected status and activity. The fact that the policy in *Boilermakers* is overly broad for this purpose, while the one here is more narrow and tailored, is hardly a reason to condemn the one here.[3]

[1] I find inapplicable my colleagues reliance on *NLRB v. City Disposal*, 465 U.S. 822, 835 (1984), for the proposition that the applicants' writing of "voluntary union organizer" on the individual job applications was protected as an "integral aspect" of the "collective process." *City Disposal* involves the issue of whether a single employee is engaged in concerted activity when he invokes a provision of a collective-bargaining agreement. That is not the issue here.

[2] In *Boilermakers*, the court found that the application provision was instituted for the purpose of permitting the respondent to consider only those factors relevant to the applicant's job suitability, and not such proscribed factors as race, disability, or union affiliation. Although here, unlike in *Boilermakers*, the application provision was in retaliation against the discriminatees, and to prevent their consideration for employment, *Boilermakers* is directly applicable because the judge and majority additionally find that the application provision is unlawful, even absent discriminatory promulgation or enforcement.

[3] Indeed, I find that the factual differences between the application provision here and in *Boilermakers* support rather than undercut the conclusion that the Respondent's application provision is facially lawful. Thus, in *Boilermakers*, Zachry sought through its application provision to prevent itself from improperly using such proscribed criteria as an applicant's race, disability, or union affiliation by proscribing

In addition, the policy here does not discriminate against union activity. The employer forbade disclosure of many factors that are irrelevant to the hiring process. Union activity was not signaled out for special treatment. Further, because, there was no discrimination, the "inherently destructive" theory of *Great Dane*[4] is not applicable here. That theory only applies where there is a showing of discrimination.

My colleagues' contend that, while an employer would be justified in eliminating questions about an applicant's union activities—in an effort to align its hiring practices with Federal antidiscrimination laws, it lawfully cannot prohibit applicants from volunteering the same information on job applications. The contention has no merit. As previously discussed, under *Boilermakers*, supra, there is no Section 7 right to disclose that information to the employer. Further, I reject my colleagues' assertion that because the disclosure of union activities or protected status on an application does not in itself cause an employer to discriminate against job applicants, there is no need to permit employers to prohibit that information. That is not a decision for the Board to make. If an employer determines that it can better comply with laws against discrimination by eliminating nonresponsive information from its application forms, the Board has no role in second-guessing this decision.

Indeed, the Employer is acting consistent with statutory policies. In general, the Act rightfully condemns employer efforts to interrogate employees about their union affiliations. In the instant situation, the Employer bends over backwards so as *not* to know of union affiliations. In that way, an employer can hire blindly, i.e., without regard to union affiliation, religion, etc. In my view, this is not an effort to "fetter" the ability of applicants and employees to bring claims of employment discrimination. Rather, it is an effort to be able to show that such claims have no merit, i.e., that the hiring was blinded.

My colleagues concede that matters such as race or gender are irrelevant, but claim that the matter of union affiliation is relevant. I disagree. Discrimination based on union affiliation, as on these other bases is unlawful, and the employer thus has a legitimate interest in being blind as to union affiliation.

Nor do I agree with my colleagues that a reasonable reading of the Respondent's application provision would disqualify applicants who include *any* information on their applications which demonstrates their link to unions. First, I note that the court in *Boilermakers* implicitly rejected a similar argument by finding that notwithstanding the language in the application prohibiting information that was not specifically sought, the applicants could still make known their union affiliation by listing, in response to specific questions, their training in union apprenticeship programs, their employment by employers known to be unionized, etc. So too here, the application provision merely prevents, in relevant part, applicants from specifically listing their protected concerted activity (such as "voluntary union organizer"). Certainly, as in *Boilermakers*, responsive information such as that relating to prior employment or training would not disqualify applicants simply because of some association with a union.[5]

My colleagues appear to argue that the application provision must be struck because applicants might be "chilled" from revealing pertinent requested information (such as prior training or work experience). I reject their argument as unsupported and speculative. There is nothing in the Respondent's rule which forbids the employee from revealing relevant training, experience, and reference. In my view, it is the majority that has cast an unreasonable interpretative gloss on the application policy.

Finally, my colleagues contend that the Respondent's rule is invalid because its real purpose is to protect the Respondent against legal claims of unlawful discrimination in hiring. I find this contention ironic inasmuch as the evidence strongly suggests that the *Union* encouraged the discriminatees to include "voluntary union organizer" on their applications precisely in order to build *its* legal case. Thus, when directing the applicants to put "voluntary union organizer" on the forms, the Union stressed that this was "important to our organizational drive." In

nonresponsive or extraneous information from the job application. In so doing, however, it did not explain *why* it was precluding consideration of applications that contained information that had not been specifically requested. Here, however, by expressly stating in its application provision that it was "an equal opportunity employer," and therefore did not want information on the application on which it lawfully could not rely in making employment decisions, the Respondent was affirmatively assuring applicants that their Sec. 7 activities, or other protected status, would not be the basis for employment decisions.

[4] *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967).

[5] My colleagues attempt to bolster their position by arguing that if an employer can preclude individuals from writing "voluntary union organizer" on job application forms, there are no limits to its ability to restrict employees from expressing any union support. This argument does not withstand legal scrutiny. It rests on the faulty premise that the act of writing "voluntary union organizer" on job applications is protected activity. Like the Eleventh Circuit, I find that it is not. Nothing in my position, or that of the court, impedes the exercise of Sec. 7 rights.

Similarly, I know of no right of an extant employee to proclaim his union adherence to an employer where, as here, the Employer wishes, for a legitimate reason, not to know about that adherence.

any event, the role of the Board is not to build a prima facie case of discrimination. It is simply to find and remedy employer discrimination where that is found.

Accordingly, I find that the Respondent's application provision is not per se violative and I would dismiss the separate Section 8(a)(1) allegation on this point.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT adopt and maintain a policy of excluding from consideration for hire applicants who disclose protected concerted activity on application forms.

WE WILL NOT adopt and maintain new application procedures in order to exclude from consideration for hire union affiliated applicants and in order to avoid more union affiliated applicants.

WE WILL NOT fail and refuse to consider applicants for employment on the basis of their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the new application procedures set forth on our new application form and in our March 6, 1998 letter to applicants.

WE WILL consider for hire Francine A. Dole, Steven A. Everett, James J. Erhardt, Richard Ferraro, Edward M. Fischer, Mark W. Flowers, Paul R. Heim, Linda R. Hummel, Angela Lambert, Carl A. Larson, Tracy Myles, Ellen E. Preischel, David D. Ricotta, Robert C. Slocum, Stephen S. Smith, Gary R. Swain, Antonio Ventresca, Kenneth J. West, James W. Yeates, Joe R. Bilger, Robert Grankowski, Danny L. Hayes, Paul Franklyn Pittorf, and Kathleen Kirk St. John for future job openings for a period of 6 months from the date of the Board's Order in accord with nondiscriminatory criteria, and notify them, the Charging Party, International Union of Operating Engineers, Local No. 17, and the Regional Director for Region 3 of future opening in positions for which the discriminatees applied or substantially equivalent positions for a period of 6 months from the date of the Board's Order. If it is shown at a compliance stage of the Board's proceedings that, but for our failure to consider the discriminatees on December 2, 1997, we would have selected any of them for any job openings arising after the beginning of the hearing on October 20, 1998, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, WE WILL hire them for any such position and WE WILL make them whole for any loss of earnings and ther benefits sustained as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, notify the discriminatees in writing that any future job applications will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider the discriminatees for employment, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

MAINLINE CONTRACTING CORP.

Michael J. Israel, Esq., for the General Counsel.
Thomas S. Gill, Esq., of Buffalo, New York, for the Respondent.
Richard D. Furlong, Esq., of Cheekowaga, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Buffalo, New York, on October 20, 1998. Subsequently, briefs were filed by each party. The proceeding is based on a charge filed March 20, 1998,[1] International Union of Operating Engineers, Local No. 17 (the Union). The Regional Director's complaint dated June 25, alleges that Respondent, Mainline Contracting Corporation, of Buffalo violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by implementing a new hiring procedure which, inter alia, prohibits job applicants from disclosing protected concerted activities and which informs applicants that they will not be hired if they disclose protected concerted activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

[1] All following dates will be in 1998, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the construction industry as a demolition contractor in the Buffalo, New York area.

It annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside New York and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (5), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Dennis Franjoine is regional manager for the Respondent and is responsible for work in New York, Pennsylvania, and Ohio. Vanessa Franjoine is the Respondent's chief operating officer. Both Dennis and V. Franjoine testified that in December 1997, there had been no policy concerning the hiring of people in the field. If D. Franjoine needed someone, he would ask the supervisor if he knew anyone who was qualified for the position, and would also ask employees if they knew anyone. At times they ran ads, but he could not remember when. In 1997, people did not always fill out applications before they were hired and most of the people hired were by word of mouth. D. Franjoine did not give the supervisors any instructions on hiring but testified that the company wanted people who were experienced in the position to be filled and that Mainline wanted to know who they were by reputation or by verifying prior experience through telephone calls. He also said he had no policy on keeping applications, he kept some and threw others away, and they stayed on his desk until he cleaned up. In December 1997, Robert Zuchlewski held a position as one of Respondent's project managers and in February 1998 he became vice president of operations. As project manager he hired certain support staff but had no duties or experience with hiring employees for the field. Field positions include those involving the operations of heavy equipment and require the work skills generally held by operating engineers or persons identifiable as equipment operators.

On December 1, 1997, union organizer, Christopher Hollfelder, drove a union member to the Respondent's Buffalo office where the member obtained a job application form. Hollfelder testified that he had learned that Respondent was one of the contractors that might be involved in a large demolition job of a plant near the Buffalo airport, and he wanted to make copies of the job application form available to members of the Union so that they could apply for work with Respondent. He made copies at the Union's office and then directed union agents to telephone members of the Union who were unemployed to invite them to come to the Union's office on December 2, to fill out job applications to submit to Respondent.

Approximately 20 members came and filled out copies of Respondent's 10-page job application form. Hollfelder instructed each member to write "volunteer union organizer" on the top of the first page of the application form because it was "important to our organizational drive." Each member also filled out several union forms, including a resume, cover letter, and union job application form to submit to Respondent along with the application form.

Later that morning, the union members were taken to Respondent's office in a bus owned by the Union. On arrival, Hollfelder accompanied the members into the office to submit their applications. The visit was video taped by member Tim Hayden. The video tape camera recorded the entire visit and the video tape was played back during the course of the hearing. The transcription of the audio portion of the video tape is reflected in the record at pages 33 through 38.

The video tape and Hollfelder's subsequent testimony shows that Hollfelder met and spoke with Project Manager Zuchlewski in the reception area. During their conversation, Zuchlewski gave Hollfelder his business card. Hollfelder informed Zuchlewski that the applicants were looking for operator, driver, or laborer work and had completed application forms with them. Zuchlewski, in an apparent reference to the video camera, said, "Can I ask what that's for?" Hollfelder replied:

> "I want to just record the application process if that's okay." Zuchlewski said:
>
> "Well, I don't see the need for it, really" and Hollfelder commented: "It's good records for their unemployment if they have to fill out anything for a job search."

The applicant then proceeded, one at a time, in an orderly manner, to submit their applications to Zuchlewski, while Hollfelder and Zuchlewski continued their conversation. Zuchlewski said that he would go through the applications and get in touch with Hollfelder. He verified that Hollfelder was the contact person to check with for the group and, when Hollfelder inquired if the applicants could come back and update their applications if necessary, Zucklewski stated that the applications would be kept on file for approximately 6 months and that job applications are kept "on file for any future reference as we need people." Zuchlewski told Hollfelder to "please feel free to come back and update" the applications as desired.

Hollfelder and Zuchlewski then discussed job openings. Zuchlewski said that there were no positions available at the time, but that there possibility would be an opening for a mechanic. As each applicant left and boarded the bus, Zuchlewski walked outside with Hollfelder where they continued their conversation. Hollfelder informed Zuchlewski of his organizing effort, offered to sit down with Zuchlewski and talk about the Union. Hollfelder thanked Zuchlewski and told him to have a nice day.

Subsequently, Hollfelder made several unsuccessful attempts to reach Zuchlewski by telephone to inquire about the status of the applications. Then, on January 5, he spoke by telephone with V. Franjoine, and inquired whether the union members' job applications were in order and Franjoine confirmed that they were.

In late January 1998, Hollfelder accompanied three more union members to Respondent's office to submit job applications. Hollfelder found the door to Respondent's office locked and a new sign on the door which stated: "Mainline Contracting is not currently accepting applications or resumes. Thank you for your interest in Mainline."

In March, each union member who had submitted applications to Respondent on December 2, 1997, received a letter from Respondent dated March 6, and signed by Vanessa Franjoine.

The letter states that "Mainline is required by law not to discriminate on the basis of race, religion, sex. . . . or protected concerted act activity under the National Labor Relations Act," and that Respondent has "adopted neutral hiring procedures and we want to tell you what they are." The letter then sets forth six items as hiring procedures. Item 4 states as follows:

> 4. **Applicants are forbidden from marking their application blanks to show race, religion, color, creed, sex, national origin, age, legal out-of-work activity, bankruptcy, or protected concerted activity under the National Labor Relations Act.** Applications delivered to Mainline with any such information on them will not be considered for any purpose. [Boldface emphasis in original.]

The letter ends by informing the applicants that Respondent is not presently hiring and that their applications would be placed in an inactive file as they were more than 30 days old.

The Respondent also began using a new application form which reads as follows on the top of the first page:

APPLICATION FOR EMPLOYMENT

> This application must be filled out in our offices. A photocopy of this application form will not be accepted. This application is valid for thirty (30) days. If you are still seeking employment at the end of thirty (30) days, you must reapply.
>
> Mainline Contracting Corp. Is [sic] an equal opportunity employer. If you provide any information not requested on this application form, such as race, religion, color, creed, sex, national origin, age, or protected concerted activity under the National Labor Relations Act, your application will be rejected and not considered for any purpose.

A representative application, that submitted by union member Francine Dole, on December 2, included a resume (on union stationary), that indicated that she had 4 years of apprenticeship course work, 11 years experience as a union journeyperson and knowledge of backhoes, track hoes, bulldozers, graders, hydraulic cranes, and forklifts. She also thereafter listed general experience on the equipment and recent specific work as a forklift, excavator, and loader operator (with a CDL class I license).

III. DISCUSSION

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by implementing a new hiring procedure which prohibits job applicants from disclosing protected concerted activities and which informs applicants that they will not be hired if they disclose protected concerted activities, citing *H. B. Zachry Co.,* 319 NLRB 967, 968 (1995), in which the Board found that an employer violated Section 8(a)(1) of the Act by adopting and maintaining a policy to disqualify job applicants who provided additional unrequested information on the employer's job application form, including information that the applicant is a "volunteer union organizer." Respondent, on the other hand, cites *Boilermakers v. NLRB,* 127 F.3d 1300 (11th Cir. 1997), in which the Eleventh Circuit considered a petition to enforce the NLRB's decision in *Zachry* and found that writing "voluntary union organizer" on the top of an application blank is designed to communicate only with the employer, and thus is not a right protected by Section 7. The court, in denying enforcement, concluded:

> The right then which the Union and the Board asked us to recognize, is the right for union applicants to let potential employers know about their union affiliation in direct contravention of the employer's neutral nondiscriminatory policy prohibiting extraneous information of any kind. We are not aware of a single court which has recognized such a right.

This proceeding involves the Respondent's apparent failure to consider or hire union affiliated applicants for positions in the construction industry equipment operators. The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), however, the foundation of Section 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court ruling that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185–187 (1941).

This case does not arise in the Eleventh Circuit and I find that it would be improper for me to rely on a court of appeals decision instead of relevant Board decisions on the issues, see *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984), in which the Board emphasized that "it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," citing *Iowa Beef Packers,* 144 NLRB 615, 616 (1963). See also *Ford Motor Co.,* 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 993, 996–1002 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979), and *TCI West, Inc.,* 322 NLRB 928 (1997). Accordingly, I shall follow the Board's precedent in *Zachary*, supra, on this issue and I find that the uncontested record shows that the Respondent directly and expressly prohibited applicants from expressing protected concerted activities under the Act on the application form. In *Zachry*, supra, the employer prohibited the provision of additional unrequested information, such as writing "volunteer union organizer" on its application form and in the instant case, Respondent's prohibition also expressly states that applications delivered to Respondent in violation of the prohibition will not be considered for any purpose. Accordingly, I find that consistent with *Zachry*, the Respondent's new hiring procedures noted in item 4 of its March 6 letter and at the top of its new application forms which prohibits and disqualifies applicants that disclose protected concerted activity under the Act are inherently destructive of employee Section 7 rights and, violate Section 8(a)(1) of the Act, as alleged.

In this connection it also is observed that the right to communicate with an employer is not solely a right of an individual, but also a right enjoyed by the Union as an agent representative of a collective group of applicants/employees. This is especially true in the construction industry, where unions and

employers can reach 8(f) agreements. In the instant case, union representative visited D. Franjoine in the summer of 1998 at a jobsite and apparently sought to discuss the possibilities of such an agreement but Franjoine indicated that he was too busy. The law also permits a union to otherwise make nonmalicious, noncoercive efforts to communicate with a company in an effort to pressure it to accede to a union's bargaining demands or organizational efforts or to protest unfair labor practices, see *Burns Security Services,* 324 NLRB 485 (1997), and here, the Respondent shows no extraordinary circumstance that would strip the Union of its rights to engage in organizational activities or activities to maintain the economic status of its members. By the same token, the use of union members, not otherwise employed in the trade, as "salts" does not affect their status as statutory employees and it does not deprive them or the union of protection under the Act, compare *M. J. Mechanical Services,* 324 NLRB 812 (1997).

The focus of the court's disagreement with the Board decision in *Zachry* appears to narrowly seize on the individuals rights to communicate with one another to organize on the jobsite and an analogy with the well established right to display union insignia in the work place that can be seen by other workers. However, in a case of this nature, where union applicants are seeking employment, it would appear that identification of union status could be communicate to company officials as well as nonunion employees and have some influence on their feelings. Moreover, it is not a question of whether this is a good or bad, or an effective or noneffective technique. Here, the issue to be decided is the basic question of whether union affiliated job applicants can be discriminated against by the establishment of hiring practices that infringe on their rights and the rights of their representative, the Union, to act on behalf of their belief. This is not a right that should be read narrowly, as suggested in the *Boilermakers* decision supra, relied on by the Respondent.

Turning to the 8(a)(3) aspect of the complaint the evidence establishes that the hiring policies expressed in Respondent's March 6 letter and set forth in its new application forms were developed and implemented for discriminatory reasons. V. Franjoine admitted that the hiring procedures enumerated in the March 6 letter, including item 4, were not in effect until after December 2, 1997. Specifically, items (1) that Respondent would not accepted applications unless there were actual job openings; (2) that it would post a notice on its door that Respondent is accepting applications; (3) application blanks must be filled out on the premises on an original application blank; (5) that only three applicants would be permitted in Respondent's office at one time; and (6) prohibiting videotaping on the premises, did not exist as Respondent's policies until after the Union's December 2 visit and all of these policies are tailored to respond to the Union's appearance at its office with 20 applicants, each of whom submitted photocopied applications which had been completed off premises.

The record establishes that Respondent also changed its policy concerning the time period during which job applications would remain active. Project Manager Zuchlewski said that the union members' applications would be kept on file for future use and for approximately 6 months. V. Franjoine, more than a month later, also told Hollfelder that the applications were still in order. The March 6 letter, however, states that, because the union members' applications were more than 30 days old, they were inactive and that the union members would have to file new applications.

The Respondent minimizes Zuchlewski's role in any hiring of field employees, however, he subsequently was promoted to a position as a vice president of operations and he clearly represented himself to the applicants and the union representative as one who held apparent authority to deal with their concerns. Moreover, at no subsequent time did the Respondent communicate any refutation of his authority to the Union or the applicants. Accordingly, I find that the General Counsel has made a showing sufficient to support an inference that the employees' union or protected concerted activities were a motivating factor in Respondent's subsequent decision to change the conditions under which applicants may seek employment. Accordingly, the testimony will be discussed and the record evaluated in keeping the criteria set forth in *Wright Line*, supra, and *Transportation Management,* supra, to consider Respondents defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.,* supra:

> an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent argues that it became concerned with compliance with antidiscrimination laws. While the application form in use in December 1997 did include questions concerning job applicants' sex and marital status, the Respondent admitted that during the 10 years the old employment application form was in use, Respondent had hired women and minorities, but their hiring had not prompted any review of the Respondent's hiring policies. The old form had no items pertaining to unions, union membership, or concerted activity under the Act and I find that there was no apparent need to alter the job application form or change any hiring policy to avoid discrimination on the basis of any Section 7 activity.

Here, there was one major intervening act, the December 2 visit of Union and the union applicants (followed up by further inquiries in January), that clearly triggered the Respondent's actions and I find that the Respondent's demonstrated prior lack of concern over hiring practices belies its expressed reasons and I find them to be pretextual. Under these circumstances, I find that the Respondent has failed to persuasively show that it would have changed its application procedures and provisions even in the absence of the events which occurred on December 2 and I find that it is thus clear that Respondent's review of, and changes to, its hiring practices were motivated by the Union's submission of job applications and not by any professed business concern. The prohibition on applicants' expression of union activities on employment applications was motivated by that action and designed to disqualify from consideration for hire union members who expressed a desire to engage in orga-

nizing activities. Accordingly, the record establishes that Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

The establishment of a policy and maintenance of hiring procedures that discriminate and prohibit considerations of an applicant who communicates his beliefs or status regarding protected concerted activity under the Act also must be found to be a practice designed to preclude consideration of an entire class of applicants. Accordingly, the Respondent is shown to have engaged in discriminatory conduct that is inherently destructive of important employee rights, see *Zachry*, supra, and *Great Dane Trailers,* 388 U.S. 26, 34 (1967), cited therein.

The Respondent's asserts that Project Manager Zuchlowski "was frightened and intimidated by the large group of people in the lobby" and that he then made up a story about the nature of the application process to get the applicant out "without physical violence." It then relies on the Board's holding in *Heiliger Electric Corp.,* 325 NLRB 966 (1998), to contend that the overall environment created by the union applicants was so intimidating and hostile as to privilege the Respondent to not consider them for hire.

Here, I find the Respondent's argument to be a gross and inaccurate representation of the record and what actually occurred. What happened here was an almost completely opposite to the factual situation in the cited *Heiliger* case, where the union applicants barged past the owner into a back office occupied by a supervisor, where they were repeatedly asked to leave and they refused to do so, and when express requests to cease video taping were ignored and, where the video taping was particularly invasive as it provided close scrutiny of personal private papers. As pointed out by the Charging Party, the video tape (GC Exh. 3) shows that the union applicants and their spokesperson, Hollfelder, were extremely respectful, courteous and professional.

A reading of the transcript of the audio portion of the video of that event as well as a viewing of the video shows that Zuchlewski was not flustered, hostile or defensive while interacting with the union agent and applicants and I do not credit any of his testimony which attempts to portray the encounter as being somehow hostile, violent or unlawful on the part of the Union. The audio demonstrates that when Zuchlewski saw the video camera he did not request that it be removed or turned off but merely said, "Can I ask what that's for." Hollfelder respectfully replied, "I want to just record the application process if that okay" and, again, Zuchlewski merely replied, "Will I don't see the need for it, really." Clearly, the Union was not asked to stop video taping and there is no other indication that the taping was invasive or illegal in nature.

Here, the Respondent attempts to distort the nature of the encounter and, in fact, gives support to the concept that a union has a valid need to document such events in order to accurately reflect the actual nature of its application attempt and thus protect itself and its members from false or misleading claims by an employer. The video shows that the applicants even lined up and individually proceed to give their application to Zuchlewski in a calm, orderly, and uncrowded manner. The whole procedure was low key, Zuchlewski shook hands as Hollhelder was leaving and there was no questionable or disruptive behavior (although a union sticker was placed on the bumper of what turned out to be Zucklowski's car which was parked outside the entrance). Accordingly, I find that the Respondent has failed completely to show that the Board's decision in Heiliger has any bearing in this case or that the applicants in any way engaged in improper activity that would act to deny them the protection of the Act to which they otherwise are entitled.

On brief, the Respondent also alludes to this court's refusal to allow an offer of proof. That did not occur. At the beginning of the hearing I granted petitions by the General Counsel and the Union to revoke subpoenas by the Respondent which sought from the Board, among other things, all changes filed by the Union alleging discriminatory hiring practices. At that time I also suggested that when the Union's agent, Hollfelder, was on the stand he could be asked some questions, which might generate the information sought. The Respondent's counsel then made a statement that if the evidence had been produced it would show a large number of charges and I then interrupted. Counsel did not preface his remarks as an offer of proof nor did he then ask to make an offer of proof but he did assert that I had denied him that opportunity. I stated that that was an incorrect representation.

I now reaffirm that conclusion.

Counsel failed to communicate any specific request to make an offer of proof. Moreover, I had already suggested that any inquiry could be deferred until a witness was on the stand. At that point if a specific offer of proof had been advanced it would have within my discretion (especially upon objection by the General Counsel or the Union), to reject an offer of proof as to an adverse witness, see *Auto Workers (Borg-William Corp.),* 231 F.2d 237, 242 (7th Cir. 1956). Although the Respondent cross-examined witness Hollfelder, it failed to ask any questions about the Union's filing of charges and thereby failed to avail itself of an opportunity to lay any further foundation. An offer of proof may be excluded where the nature of the evidence sought to be adduced was made know to the court, as here, by the description in the subpoena and otherwise was apparent from the context of counsel's statements. Moreover, in this instance the purported offer related to information from an adverse party, the subject material was of no probable relevancy and it was material from an adverse party that had been revoked as a valid subject for a subpoena and, under these circumstances, it was neither a valid nor a viable offer of proof and a ruling that cuts off debate on the matter does not affect any substantial procedural right of the Respondent.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By implementing a new hiring procedure which prohibits job applicants from disclosing protected concerted activities and which informs applicants that they will not be hired if they disclose protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. By discriminatorily implementing a new hiring policy because union members had applied for employment with Re-

spondent, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Here, there is no allegation that the Respondent refused to hire anyone, accordingly, the relief granted will be limited to an order requiring rescission of the hiring rules found to be illegal and requiring future consideration of the named applicants or other union affiliated applicants who may seek employment. Such consideration shall be for a period valid for 6 months (the timeframe first announced to the applicants). Otherwise, it is not considered necessary that a broad order be issued.

[Recommended Order omitted from publication.]